be made to some extent into the reasonableness of the employer's dissatisfaction.

The problem of the preceding discussion is again involved in the construction of a provision that title shall be "satisfactory" to the vendee in an executory contract for the sale of land. Here, also, the decisions are in conflict. The prevailing view in this class of contracts is ably expressed by Chancellor Kent: "Nor will it do for the defendant (vendee) to say he was not satisfied with his title, without showing some lawful incumbrance or claim existing against it. A simple allegation of dissatisfaction, without some good reason assigned for it might be a mere pretext, and cannot be regarded." [10] This would seem to be the correct view but it is to be noted that it does not correspond to the weight of authority where the construction of the term "satisfaction" arises in a contract of employment.[11] With regard to a contract for the sale of land the courts proceed upon the theory that it must have been the intention of the parties that a valid or marketable title should be satisfactory, although the vendee would have been able to demand a marketable title had there been no mention of a satisfactory title in the agreement. It is suggested that the reason for arriving at this intention of the parties may be found in the fact that the title to land does not involve the personal taste or feeling of the vendee, whereas many contracts of employment do involve such elements.

However, there is considerable authority for the proposition that in an executory contract for the sale of land a provision that the title shall be satisfactory to the vendee, is to be construed to give the vendee an arbitrary right to repudiate the contract on the ground of dissatisfaction with the title, provided only that it be arrived at in good faith.[12] These cases must necessarily proceed on the theory that under the contract the purchaser is the person to be satisfied and to allow a jury to decide would not carry out the contract of the parties.

R. H. W.

LIBEL—IS AN UNSEALED LETTER PUBLICATION?—One of the fundamental elements which must be proved in every action or prosecution for libel or slander is the publication of the defamatory matter. In criminal indictments, it is sufficient to prove the com-

[10] Folliard v. Wallace, 2 Johns, 395 (N. Y. 1807). See also Dillinger v. Ogden, 244 Pa. 21 (1914), 37 Am. & Eng. Ann. Cas. 533; Moot v. Business Men's Ass'n, 157 N. Y. 201 (1898); Giles v. Paxson, 40 Fed. 283 (1889).

[11] For an interesting comparison of a contract to sell land and a contract of employment, see Dillinger v. Ogden, *supra,* note 10, and Corgon v. Geo. F. Lee Coal Co., *supra,* note 1.

[12] Liberman v. Beekwith, 79 Conn. 317 (1906); Hollingworth v. Colthurst, 78 Kans. 455 (1908).

munication of the words complained of to the person defamed;[1] but in civil suits, there must be a communication to a third person.[2]

One who brings a civil action for libel or slander ordinarily must prove that there was in fact a communication to a third person, and that it was due to the fault of the person sued. For instance, if a libellous letter is sent directly to the person libelled, in a sealed envelope, and no third person reads it;[3] or if a third person does read it, but the sender could not anticipate that this would occur, the sender is not liable in a civil suit.[4] On the other hand, if the sender could reasonably have foreseen that a third person would read the letter—as where he knows it is the duty of a clerk to open and examine the recipient's mail—and such third person does actually read it, the sender is subject to suit.[5]

But there are intermediate cases which seeem to have puzzled the courts. For example, a man mails a libellous post-card, and no witness can be produced in court other than the recipient who has read the card. Many courts say that it is fair to presume that some third person has read it, though no proof be offered.[6] In such a case a presumption is raised, on account of the difficulty of actual demonstration. Again, a man sends to the person libelled a defamatory letter in an envelope the flap of which is not fastened. Should this be considered in the same category as the post card, or should it be treated as a sealed letter?

This problem arose in a recent English case[7] under the following circumstances: A husband mailed to his wife a libel upon her, contained in an unsealed and ungummed envelope, bearing a halfpenny stamp, and addressed to the wife in her maiden name. The Post Office authorities had the right to examine the contents of envelopes bearing halfpenny stamps, but no evidence was offered that they had done so in this instance. It was proved, however, that the wife's butler, his curiosity excited by the mode of address, had opened the envelope and read the libel, though this was admittedly a breach of his duty. Two points were made, *inter alia,* against the husband: that there was a presumption of publication to the postal

[1] State v. Avery, 7 Conn. 266 (1828). This is on the ground that the libel tends to produce a breach of the peace. Rex v. Wegener, 2 Stark. 245 (Eng. 1817).

[2] Roberts v. English Mfg. Co., 155 Ala. 414 (1908); Yousling v. Dare, 122 Ia. 539 (1904). In Scotland, however, no publication to a third person is necessary to found a civil action, as the Scotch law considers the injury to the feelings of the person defamed a sufficient basis for damages. Mackay v. M'Cankie, 10 Session Cases, 4th series, 537 (Scotland 1883).

[3] Spaits v. Poundstone, 87 Ind. 522 (1882).

[4] Sylvis v. Miller, 96 Tenn. 94 (1896).

[5] Rumney v. Worthley, 186 Mass. 144 (1904).

[6] Logan v. Hodges, 146 N. C. 38 (1907); Spence v. Burt, 18 Lanc. L. R. 251 (Pa. 1901).

[7] Huth v. Huth, 113 L. T. 145 (Eng. 1915).

officials, and that there was a publication to the butler. The court negatived both propositions.

The two questions raised in this case are separate, and depend upon different considerations. The postal authorities have a right to examine mail matter of a certain class, and no doubt exercise that right in a certain proportion of cases. Shall the law presume that they have done so in a particular instance? In the question of publication to the butler, however, there is an actual perusal by an outside person, but should the sender of the letter be held responsible for that perusal?

The general rule is that publication must be affirmatively established, in order to create liability for defamation.[8] But often it is practically impossible to prove actual publication, that is, in the sense of finding a witness to swear that he heard or read the defamation and comprehended it. This is true notably in the case of post cards and telegrams. Should the law aid the plaintiff in such cases by presuming publication, though no such witness can actually be produced? A telegram is necessarily transmitted by a clerk who reads it, though this may be done mechanically and without attention on his part to the real sense of the message. Yet it has been held that a communication by telegraph is a publication to the telegraph company, though no clerk be found who remembers reading the particular message.[9]

The telegram, however, presents a stronger case for the plaintiff than the post card. No one has the duty of reading post cards, except the actual parties thereto; and as a matter of fact, it is unlikely that a busy postal clerk will have time to read cards passing through his hands. Country postmasters, however, are in fiction at least supposed to constitute an exception to this rule. Again, however, there is a difficulty of legal proof, so certain courts have relieved the plaintiff of this necessity by raising a presumption that there was a publication. But it should be remembered that it is much more difficult for the defendant to prove that no third person read the post card than it is for the plaintiff to prove that some third person did read it; and in addition it must be remembered that according to the general rule the burden of proving publication is on the plaintiff.[10] The propriety of making the presumption, therefore, is not universally conceded.[11]

An unsealed letter bearing a halfpenny stamp is somewhat different from a post card. On the one hand, it is not so open to the eye, and therefore not so likely to be read casually; but on the other hand, there is an actual duty on the part of the postal authorities to

[8] McGeever v. Kennedy, 19 Ky. L. Rep. 845 (1897); Odgers: Libel & Slander 152 (4th ed., 1905).

[9] Monson v. Lathrop, 96 Wis. 386 (1897).

[10] *Supra,* note 8.

[11] See Steele v. Edwards, 15 Ohio C. C. 52 (1897).

examine a certain number of such letters. It would seem that courts which favor the plaintiff sufficiently to presume publication of a post card, where there is no duty of examination by third persons, should follow this reasoning consistently in the case of an unsealed letter, where there is such a duty as to that class of mail, though not necessarily as to the particular letter. But on principle it might be argued that the plaintiff should be required strictly to sustain his usual burden of affirmative proof. The English court, in the case under discussion, draws a distinction between the post card and the unsealed letter, and refuses to apply the doctrine of presumptive publication to the latter.

Where it is proved that a third person has read a libel, but under circumstances which render his act a breach of duty, a different problem is presented. Again a comparison may be made between a post card and an unsealed letter. It is really a breach of moral duty at least to read post cards addressed to another, though there may be times when one's eye happens to fall upon a writing without volition. But the courts have not considered that point in those decisions which hold one responsible for publication by post card. They say simply that one should anticipate that post cards will probably be read by outside parties, whether in breach of duty or not. Where the defendant knows that it is the duty of a clerk or other third person to read mail passing through his hands, it is established that there is a publication;[12] and these courts extend the doctrine to the situation where it is to be foreseen that someone other than the addressee will read the libel, though there is no duty so to do. It is conceivable that one may libel another and yet not be morally blameworthy, as where one believes the truth of the libel and feels it one's duty to communicate it to the person defamed; yet in such cases it has been declared that the defamer should use every reasonable precaution to prevent the libel from becoming public, and should not let a slightly higher postage prevent him from using a sealed letter.[13]

Why should not one who sends a libel in an unclosed envelope take the risk of its being read by a curious butler? The argument in reply is that a servant will seldom go to the extent of opening an envelope, even though it be unsealed, to gratify his curiosity. Whether this is so or not is a question which can hardly be answered by convincing demonstration. The decision necessarily must be influenced largely by the general inclination of the judicial body which hands it down, unless the principle be adopted that a defamer is not responsible for a communication to a third person due to a breach of duty on the part of the latter, whether such breach could have been foreseen or not.

E. E.

[12] Delacroix v. Thevenot, 2 Stark 63 (Eng. 1817); Seip v. Deshler, 170 Pa. 334 (1895).

[13] Robinson v. Jones, 4 L. R. Ir. 391, 396 (Ireland 1879).